Associated Builders and Contractors of Michigan

Joint House Committee Meeting
House Commerce Committee and House Labor Committee
February 26, 2008
Testimony of Chris Fisher
Associated Builders and Contractors of Michigan

Good Morning Chairman Meisner, Chairman Miller and members of the Committee. Thank you for the opportunity to be here today. My name is Chris Fisher and I am with Associated Builders and Contractors of Michigan. I appear before this committee in opposition to HB 5783.

While our statewide membership appreciates the intent of this bill and the desire to encourage a good faith compliance with existing state law, there are serious flaws that should first be addressed before reporting this particular bill out of committee.

Our concern stems from the prevailing wage component of this bill. At this time we do not seek to weigh in on the pros or cons or prevailing wage. Instead, what we seek to bring to the attention of the committee is the untenable, unpractical and over-reaching penalties contained within this bill and what we believe to be unintended and detrimental effects that extend beyond the intent we think that is likely driving this legislation.

As members of the committee may know, this bill states that if a contractor or subcontractor is to be found in violation of Public Act 166 of 1965, Michigan's Prevailing Wage law, that contractor faces the following:

- The contractor shall not receive any further payments under the contract.
- The contractor may be held financial liable for costs incurred to rebid the contract.
- The contractor may face debarment form participating in future bidding opportunities.
- The contractor may be required to return any payments already received under the contract.

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Clearly the intent of this bill is to discourage contractors from deliberately underpaying their employees and to enable the State of Michigan to further panelize contractors who do not comply with state law.

Unfortunately though, the wording of this bill does not differentiate between those contractors who knowingly, willingly and continuously violate the prevailing wage act from those contractors who on a single occasion mistakenly classified the wage of an employee and immediately correct the error.

I would hope that members of this committee would recognize the difference between (A) A contractor who knowingly, willingly, continuously and illegally violates our state's prevailing act; and (B) A reputable contractor who has a single instance where the work classification of an employee is mistakenly inputted, and the error is then rectified immediately once the oversight is discovered.

Clearly these are instances where one firm continues to do the wrong thing, and another does the right thing. Clearly there is a difference between right and wrong. However this bill does not distinguish between a contractor doing what is right and one doing what is wrong because the bill is currently worded in such a way that a good contractor who does the right thing is treated the same why as the shoddy contractor who continually violates the law.

For those not completely familiar with the workings of Michigan's prevailing wage act, make no mistake, honest classification errors do occur from time to time. For example, if a carpenter were to put down his hammer, then goes over and picks up a paintbrush and then a shovel, he may have passed over three different job classifications in a matter of minutes, all of which require a different prevailing wage pay rate. If that same carpenter uses that same hammer at a different location on a building site, for example on a roof, he has also crossed over at least one other classification with an entirely different prevailing wage and fringe benefit rate.

Taking this into consideration, it's easy to imagine therefore, that there will be those instances where a misclassification of wage rates occur, no matter how diligent a contractor is. It's inevitable. Unfortunately, even if a contractor immediately corrects an error, that company

would still have violated Michigan's Prevailing Wage Act. Because of that, this bill would stipulate that the state stop all payments to the contractor and bar the contractor and his employees from future work opportunities. Moreover, the state would be allowed to make that contractor repay all payments made on a project back to the state.

Just think about what this means: If a contractor has finished 99% of a $50 million construction project without a single prevailing wage violation, and then an isolated instance occurs where a human resources glitch results in an employee being misclassified and hence underpaid 30 cents an hour for five or six hours, that company is now in violation of the act. That means that if this bill were to be adopted without changes, as it currently reads the state could actually go after that contractor for repayment for almost the entire cost of the nearly completed $50 million project.

And honest mistakes do occur. I know of a contractor who recently completed a multi-million dollar project who inadvertently mis-paid four employees. One employee was underpaid a relatively small amount of dollars while the other three employees were inadvertently overpaid a small amount. Even though the employer naturally went back and corrected the mistake (only for the employee who was underpaid) he was still cited for violating the prevailing wage act. As members of this committee and as men and women of good conscience, do you truly intend for this bill to result in such a contractor from being disbarred, subjected to stopped payments, financially liable for rebidding the contract and then forced to return all payments received for the contract even if the project is nearly completed all because of a technical violated that was corrected?

I doubt this is the case and that instead this bill is meant to go after the sort of chronic and intentional shoddy contractor who knowingly, willingly, continuously and illegally violates our state's prevailing act. However, that needs to be clarified before this bill can be reported out of committee.

And there are other concerns as well. For example, this bill does not take the important step of ensuring there will be no secondary liability for prime contractors, who have no authority to interfere with internal affairs of the independent businesses with whom they subcontract. Yet if a

subcontractor is found to be in violation of the prevailing wage act, the general contractor could actually be liable as well according to how this bill is currently written.

Clearly Mr. Chairmen and members of the committee, we need to allow for the committee process to work and address the need of correcting these serious flaws that I cannot imagine ever being part of what this bill is intended to do. At the very least minor, technical violations resulting from wage classification errors like those I shared should not be affected by this bill; we would also suggest that only those firms who have multiple serious violations be subjected to the penalties prescribed by this bill, and that the bill add a protection to prevent a prime contractor from being held secondarily liable for a subcontractor's violation.

These changes would make this bill much better by addressing some of the unattended consequences that the bill presently does not take into consideration and bring it into line to better reflect the intent we think that is likely driving this legislation, which is to go after those who knowing and continuously seek to violate state law.

Because of the language contained in the bill as it is currently before you, we therefore urge you to not report House Bill 5783 out of committee.

Once again, I would like to thank you Chairman Meisner, Chairman Miller and members of the Committee for the privilege to be here today. I would be happy to take any questions you or your fellow committee members may have.

MICHIGAN CHAMBER OF COMMERCE

MEMORANDUM

To: Members of the House Labor and Commerce Committees

From: Wendy Block, Director of Health Policy and Human Resources WB

Subject: Chamber Opposes Bills Making Employers "Immigration Police"

Date: October 16, 2007

The purpose of this memorandum is to express the Michigan Chamber's opposition to House Bills 5780-91, legislation to make Michigan employers who are receiving tax credits, state financing, loans and/or other funds the "immigration police" by requiring them to not only verify the legal status of their employees (as required by federal law) but also to require employers to verify the legal status of their contractor's employees. In addition, we have questions regarding the requirements found in the bill to require employers receiving these funds to hire only Michigan workers.

For background purposes, you should be aware that federal law requires employers to check the legal status of each of their workers. Within the first three days of employment, an employee must show the employer a document or combination of documents to prove their identity and eligibility to work. The employer then must fill out the Form I-9 and retain it.

Unfortunately, the I-9 process is susceptible to fraudulent documents, as well as identity fraud. If a document looks valid on its face, an employer may not legally ask questions without the risk of violating anti-discrimination laws. Hence, the current system has made it impossible for employers to really know who is actually authorized to work and who is not. There are numerous examples of instances where the Department of Homeland Security (DHS) has conducted an audit or raid of an employer and found the employer to not be at fault because s/he followed the law, filled out the proper forms and documents, and could not have known that the employee(s) in question were not authorized to work.

Given the complexity of verifying the legitimacy of documents used to determine legal work status, the Michigan Chamber has significant concerns with the language in HBs 5780-91. Specifically:

1. The bill language, at a minimum, should be tightened to require employers to state that they will not "knowingly" hire illegal immigrants or "intentionally violate" immigration laws. Given that the bills would revoke funding and possibly even require repayment, we feel it would be appropriate to punish only those who had actual knowledge that they were hiring illegal workers.

2. The language should be amended to remove the requirement that employers be made the **"immigration police"** for the purpose of verifying the legal status of their contractors' employees. As drafted, the bills would require businesses to verify the legal status of their contractors' employees, even if those employees aren't working on jobs involving state funds because the legislation covers all "employees of any contractors hired by the applicant". Furthermore, we have concerns with how this would work from a practical standpoint (i.e., how an employer would verify the legitimacy of the contract employee's I-9 documents) and whether there are privacy issues related to this requirement.

In addition to the immigration requirements found in HBs 5780-91, we have questions regarding the resident-only hiring requirements. While we agree that Michigan companies should be awarded financing, grants, loans, projects, etc. when all things are equal, there may be instances where this may not be practical. For example:

1. Should a company be awarded a bid on, for example, a state construction project just because that company only hires Michigan residents? Shouldn't the State also take into consideration who is best equipped to handle a given job and/or the project costs associated with each bid? Wouldn't this be wise given the state's tight fiscal situation?

2. Has the Legislature looked into instances where state agencies have awarded bids to out-of-state companies (e.g., DMB paying an Ohio company double the price of a Michigan company to pulverization versus shred state documents)? Why aren't state agencies and authorities implementing and pursuing Michigan-worker-first requirements today?

3. How will this "Michigan-workers-only" requirement impact the MEDC's efforts to attract out-of-state or out-of-country companies through the use of MEGA and Brownfield credits?

Thank you for the opportunity to submit to the Committee these comments, questions and concerns. Please do not hesitate to contact me, Tricia Kinley or Jim Holcomb if you have further questions at (517)371-2100.